IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL WRIT PETITION NO. 4 OF 2004

(1) Mr. Laxmikant D. Naik Karmali
son of late Damu Datta Naik Karmali,
major of age, civil engineer, having
his office near St. Joaquim Cahpel,
Borda, P.O. Fatorda, Margao, Goa 403 602.

(2) Mr. Bhaskar D. Naik Karmali,
son of late Damu Datta Naik Karmali,
major of age, businessman, having
his office at Curchorem, Goa 403 706. ..... Petitioners.

V/s.

(1) Mrs. Lauriana Fernandes e Diniz,
major of age, widow, housewife,
wife of late Mr. Pedro Caetano Diniz,
and her daughter.

(2) Ms. Luciana Diniz, major of age,
daughter of late Pedro Caetano Diniz,

Both residing at House No.441,
Sanglem Waddo, Majorda, Salcete,
Goa 403 713, and also residing
C/o. Magdalena's House,
near Joy Bar and Rose Bar,
Vodlem Mol, Cacora,
P.O. Curchorem, Goa 403 706.

(3) State of Goa. ..... Respondents.

Mr. P. A. Kholkar, Advocate for the petitioners.

Mr. M. S. Sonak, Advocate for the respondents No.1 and 2.

CORAM : D.B. BHOSALE, J.

DATE : NOVEMBER 29, 2007.

ORAL JUDGMENT :

This criminal writ petition under Article 227 of the Constitution of India, read with Section 482 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C.") is directed against the Judgment and Order dated 25.11.2003, rendered by the Sessions Judge, South Goa, Margao in Criminal Revision Applications No.48/2003 and 55/2003. By the impugned Judgment, the learned Sessions Judge has allowed the revision application and set aside an order dated 4.8.03 passed by the trial Court declining to recall the process issued against the respondents/accused in a private complaint dated 9.5.02 under Section 499 of the Indian Penal Code (for short "IPC").

2. The complaint and the submissions of learned Counsel for the parties revolve around a public notice, published in a daily newspaper "The Navhind Times" dated 23.12.2000 issued by the accused/respondents. This notice, according to the complainants, contains imputations and allegations against them which are per se defamatory. It is also alleged that the notice was published with malice intentions, causing alarm in the minds of prospective purchasers about the complainants who along with their brother Narendra D.

N. Karmali were, at the relevant time, carrying out development work in their property surveyed under No.126/ 1 and 2 and were intending to sell the sub-divided plots therein to the prospective purchasers. The complainants also stated that they had received various offers from the prospective purchasers of the plots and consequently, several agreements of sale were entered into by the complainants in order to sell individual plots in the said land. It would be relevant to reproduce the said public notice for better appreciation of the submissions advanced by the learned Counsel of the parties. The notice dated 23.12.2000 as published in The Navhind Times, reads as under :

> " Notice is hereby given to the public that Shri Bhaskar D.N. Karmali, Shri Laxmikant D.N. Karmali and Shri Narendra D.N. Karmali who are developing and selling the plots through their power-of-attornies, agents, etc. from the property surveyed under no.91/1 to 7, 92/1 to 136, 120/1 to 100, 121/1 to 3, 122/1, 123/1 to 8, 124/1 to 16, 125/1 to 39, 126/1 to 2, 127/1 to 28, 128/1 to 3, 129/1 to 2, 130/1 to 90, 131/1 to 2, 132/1 to 78, 133/1 to 6, 134/1 to 27, 135/1 to 20, 136/1 to 16, 137/1 to 32, 138/1 to 21 of of Village Xeldem, Taluka of Quepem are not the owners of the said property. The actual owners and the holder of the property surveyed under no.1 to 323 including all sub-divisions of village Xeldem and parts of adjoining villages of Cacora, Amona, Srvoi, Avedem, Chaifi, Assolda, Xic Xelvon, Xelvon, Xelvon, Odar, Cusmane, Cotombi, Quepem, Ambaulim, Deao,

> all Taluka of Quepem are Mrs. Lauriana Fernandes e Diniz, Luciana Diniz and Anastasia Diniz. Public is hereby warned by this notice to refrain from purchasing the plots or not to enter into any kind of sale transaction of whatsoever nature in respect of the said property with the aforesaid persons who have no right, title to enter into sale transaction, despite this publication of notice, the public still enter into transaction of sale, then they shall do so at their own risk and consequences."

3. I heard the learned Counsel of the parties for considerable length and perused the impugned Judgment and Order of the Sessions Court, so also the other material and the judgments of the Supreme Court relied upon by the learned Counsel of the parties. Mr. Kholkar, learned Counsel appearing for the petitioners, at the outset, submitted that the Magistrate has been given an undoubted discretion in the matter of issuance of process and if he has exercised his discretion, it is not open for the Sessions Court or even to this Court to examine the case on merits with a view to find out whether or not the allegations in the complaint, if proved, would ultimately end in conviction of the accused. In support of this submission, he placed reliance upon a judgment of the Supreme Court in ***Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi and ors.***, reported in (1976) 3 SCC 736. He then submitted that in a case under Section 499 of IPC, the question of application of exception to Section 499 of IPC does not arise at the stage of issuance of

process. The question of applicability of the exception will have to be looked into during the trial of the complaint and not at the stage of considering whether the Magistrate was justified in issuing the process. In support of this contention, he placed reliance upon a judgment of the Apex Court in the case of ***Balraj Khanna and ors. vs. Moti Ram*** reported in AIR 1971 SC 1389. Mr. Kholkar then submitted that non-examination of witnesses at the stage of issuance of process, will not affect the case of the complainant and, therefore, that cannot be a ground for quashing the process. He next submitted that a bare reading of the public notice is sufficient to hold that the imputations in the notice are per se defamatory and it will have to be assumed that there is defamation and that by itself will not go to the advantage of the accused since the stage of establishing the case of the complainant, on evidence, has not yet reached. In support of this submission, he placed reliance on a judgment of the Apex Court in ***K.T. Thomas v. Dr. K. Jagadeesan.,*** reported in AIR 2001 SC 2651. He next submitted that the contents of the notice were not only defamatory, but they were also false and such a falsehood, would also amount to defamation. Lastly, he submitted that the accused cannot, at the stage of framing charge or taking cognizance, produce any material to prove his innocence when he applies for recalling of the process. In support of his contention, Mr. Kholkar relied upon a judgment of the Supreme Court in the case of ***State of Orissa vs. Debendra Nath Padhi***

(2005) 1 SCC 568. He did not make any other submission.

4. On the other hand, Mr. Sonak, learned Counsel of the accused has submitted that the notice, in question, published by the accused is nothing short of a routine notice which one can read in the newspapers and a bare reading of the notice does not amount to defamation of the complainants, as it was issued by the accused only with an intention to protect their right to their own property. He submitted that none of the judgments relied upon by the learned Counsel for the complainants, would apply to the facts of the present case, in view of the fact that a mere reading of the notice does not even remotely suggest that the imputations therein are defamatory. None of the imputations, at any stage, could be termed as defamatory. He then invited my attention to a judgment of the learned Single Judge of this Court in the case of ***Mr. Valmiki Faleiro vs. Mrs. Lauriana Fernandes and anr.*** (Criminal Rev. Application Nos. 24, 25, 26 and 27 of 2004) decided on 10.3.05. He submitted that the accused in the revision applications and in the instant writ petition, are the very same accused, though the complainants in both the cases are different. He then submitted that the contents of the public notice, published in the instant case and in those revision applications, are also word to word same, except the names of the complainants, survey numbers and the names of the villages. This Court, in almost similar situation, has dismissed

the revision applications filed by the complainant and confirmed the order of the Sessions Court, quashing the process. He submitted that there is, absolutely, no difference between the two cases and he, therefore, strongly relied upon the judgment of the learned Single Judge in support of his submissions. Mr. Sonak then invited my attention to a judgment of this Court in ***Rajendra Kumar Sitaram Pande and others vs. Uttam and another.,*** reported in (1999) 3 SCC 134 and submitted that even at the stage of considering the prayer of the accused for quashing of the process, the Court can peruse the allegations and find out whether any of the exceptions to Section 499 is attracted to hold that the imputations do not amount to defamation.

5. The learned Single Judge of this Court in ***Valmiki Faleiro's case (supra)*** was dealing with the revision applications filed against the very same accused and a similar order of the Sessions Court, wherein the Sessions Court had quashed the process. The public notice which was published in the very same news paper viz. The Navhind Times on 13.5.2001, in that case, reads thus :

> " Notice is hereby given to the public that one Mr. Valmiki Faleiro, resident of Margao and others who are developing and selling the plots through their Power of Attorneys, agents, etc. from the property surveyed

between Nos. 251 to 522 including all sub-divisions of village Cacora, taluka of Quepem are not the owners of the said property. The actual owners and the holder of the said property as well as the property surveyed under nos. 1 to 323 including all sub-divisions of Village Xeldem and parts of adjoining villages Amona, Srvoi, Avedem, Chalfi, Assolda, Cottombi, Xic Xelvon, Xelvon, Xelvon, Odar, Cusmane, Ambaulim, Quepem and Deao, all taluka of Quepem are Mrs. Lauriana Fernandes e Diniz, Luciana Diniz and Anastasia Diniz.

Public is hereby warned by this notice to refrain from purchasing the plots or not to enter into any kind of sale transaction of whatsoever nature in respect of the said property with the aforesaid persons who have no right, title to enter into sale transaction. Despite this publication of notice the public still enter into transaction of sale, then they shall do so at their own risk and consequences.

Mrs. Lauriana Fernandes e Diniz, Luciana Diniz and Anastasia Diniz 12/5/2001"

A perusal of these two notices, would show that except the name of the complainant, survey numbers and the names of Villages, there is absolutely no difference between the two public notices. The learned Single Judge, after considering the notice and dealing with the contentions, urged by the learned Counsel for the parties, has observed thus :

"The essence of offence of defamation is the harm caused to

the reputation of a person. Character is what a person actually is and reputation is what neighbours and others say he is. In other words, reputation is a composite hearsay and which is the opinion of the community against a person. Everyone is entitled to have a very high estimate of himself, but reputation is the estimation in which a person is held by others. The commission of offence of defamation or publishing any imputations concerning any person must be "intending to harm or knowing or having reason to believe that such imputation will harm the reputation of such person. The notice in question on the face of it does not contain any such imputation which could be said to harm the reputation of the complainant. On the other hand, a bare reading of the said notice shows that it has been published by the accused nos. 1 and 2 with a view to protect the right to the property which they believe they have a right. (emphasis supplied). A person reading the said notice may at first flush be a little amused that the said accused are claiming a set of villages rather than think that it is published with a view to defame the complainant. All that the said accused have conveyed by the said notice is that the property/properties do not belong to the complainant but belong to them and that anyone dealing with the complainant will be doing so at their own risk. The contention that the said notice is per se defamatory and that it attributes dishonest intention that the complainant lacks business character and propriety appears to be a figment of the complainant's imagination. Such a conclusion cannot be

> culled out by a normal prudent person from a reading of the said notice which apparently was published by the said accused nos. 1 and 2 to protect a right which they believe they have to the property and with a view to warn others that in case they enter into any transaction of sale with the complainant they would be doing so at their own risk and consequences. A reading of the notice, on the face of it, does not show that it was published with intention or knowledge to harm the reputation of the complainant. In my view, the learned Sessions Judge was right in exercising his discretion to quash and set aside the Order issuing process against the aforesaid accused."

6. I do find myself in agreement with the view expressed by the learned Single Judge of this Court that the imputations in the public notice are not per se defamatory. The question whether upon reading the complaint and the notice, can it be said that a prima facie case exists for trial and if not, calling upon the accused to face trial would be a travesty of justice. In other words, whether the allegations in the complaint read with the notice, make out an offence under Section 500. Section 499 of IPC defines an offence of defamation and Section 500 provides the punishment for such offence. Section 499 with Explanation IV to Section 499 of IPC in the instant case is relevant, which reads thus :

> " **499. Defamation.** - Whoever, by words either spoken or intended to be read, or by signs or by visible representations,

> makes or publishes any imputation concerning any person intending to harm, or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter expected, to defame that person.
>
> *Explanation 4.* - No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful."

A mere reading of this provision would show that no imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others, lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful. From a perusal of the allegations made in the complaint and the imputations made in the public notice, I am satisfied that no case of defamation is made out. None of the imputations in the notice have even remotely harmed the complainant's reputation in the estimation of others. Even if the litigations pending between the parties are not taken into

consideration at this stage, still, in my opinion, a plain reading of the complaint would not amount to defamation. A mere perusal of the notice shows that the accused are under the bonafide belief that they have a right in the survey numbers and under that belief, have simply cautioned the people about the transactions they would make with the complainants. It is clear that they published the notice only with a view to protect their right and interest to the property. The learned Counsel for the petitioners could not demonstrate as to which part of the notice or imputation therein has caused harm to the complainant's reputation or could be termed as defamatory. Merely because the accused has no concern with some survey numbers mentioned in the notice, that, by itself, would not amount to defamation. The survey numbers mentioned in the notice simply indicate that the accused referred them only with a view to protect their right and interest to the said property.

7. The publication of such notices in the newspaper is a common feature in this country and they are routine notices published for the information of public at large. If such notices, wherein there is no allegation or imputation which could be termed as defematory, are made cause for filing complaints for defamation, and if Courts take cognizance of such complainants, there would be a new crop of criminal litigation which not

only would cause harassment to the so called accused, but would also waist courts' valuable time and energy which could be engaged in disposing of cases awaiting decisions for a long.

8. The submission that the exceptions cannot be considered at this stage and reliance on the Judgment of the Supreme Court in the ***Balraj Khanna's case (supra)*** in that regard will not be of any help since the question of considering the exceptions in the instant case, does not arise in view of the finding that none of the imputations in the notice harm the complainant's reputation. It is true that the Magistrate is given undoubted discretion in the matter of issue of the process. But he is expected to exercise his discretion judicially. It is well settled by a long catena of decisions of the Supreme Court and High Courts that at the stage of issuing process, the Magistrate is mainly concerned with the allegations made in the complaint or the evidence led in support of the same and he is only to be prima facie satisfied whether there are sufficient grounds for proceeding against the accused. He is not expected to enter into the detailed discussion of the merits or demerits of the case. If the Magistrate does not exercise his jurisdiction in the manner in which he is expected to do so, it is always open either in the revision or in a writ jurisdiction, read with Section 482 of Cr.P.C. to interfere and quash the process. In ***Rajendra Kumar Sitaram***

Pande's case (supra), the Supreme Court did not allow the case to continue further because Exception 8 to Section 499 in that case applied and consequently, held that calling upon the accused to face trial would be a travesty of justice. The Judgment in ***K.T. Thomas's case (supra)*** would not apply to the facts of the present case, in view of the observations made in the foregoing paragraphs holding that the imputations in the public notice are not defamatory. For the similar reasons, the Judgment of the Supreme Court in ***Debendra Nath Padhi's case (supra)*** is of no avail to the petitioners.

9. I am satisfied that no case of defamation is made out and I agree with the findings recorded by the Sessions Court in that regard. In my opinion, requiring the accused in the present case to face trial would not be in the interest of justice. Equally, I do not find any reason to take a different view than the one taken by the learned Single Judge in a similar circumstances in ***Valmiki Faleiro's case (supra).***

10. In the circumstances, the writ petition is dismissed.

D.B. BHOSALE, J.

ssm.